SUPREME COURT OF THE UNITED STATES.

No. ~~222.~~ 139.

FREDERICK B. LEONARD AND CHAUNCEY P. IVES,
Pl'ffs in Error,

vs.

CHAUNCEY DAVIS, ALFRED E. LOOMIS, AND JOHN C. DOE, AND THEODORE NEWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MICHIGAN.

GIDEON, Printer.

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UNITED STATES OF AMERICA.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Michigan, greeting:—

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said Circuit Court of the United States for the Seventh Circuit and District of Michigan before you, between Frederick B. Leonard and Chauncey P. Ives, plaintiffs, and Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell, defendants, a manifest error hath happened, to the great damage of the said Frederick B. Leonard and Chauncey P. Ives, as by their complaint appears, and it being fit that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington, on the first Monday of December next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fifth.

[SEAL.] WM. D. WILKINS,
Clerk of the Circuit Court of the United States
for the Seventh Circuit and District of Michigan.

I hereby allow the within writ of error, Sept. 24th, 1860.

ROSS WILKINS,
U. S. District Judge for the District of Michigan.

The execution of the within writ of error appears by the return hereto annexed. WM. D. WILKINS, Clerk.

Endorsed: Circuit Court, District of Michigan. Frederick B. Leonard, and Chauncey P. Ives, pl'ffs in error, *v.* Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell, def'ts in error. Writ of error.

United States of America.

To Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell, greeting:—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Seventh Circuit and District of Michigan, wherein Frederick B. Leonard and Chauncey P. Ives, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty.

ROSS WILKINS,
U. S. District Judge for the District of Michigan.

District of Michigan, *ss.*

Due legal and personal service of the within citation by copy is hereby admitted for all of said defendants in error.

GEO. V. N. LOTHROP,
Attorney for Defendants,
said Davis, Loomis, Dore, and Newell.

Dated Detroit, Nov. 3d, A. D. 1860.

Pleas before the judges of the Circuit Court of the United States for the Seventh Circuit and District of Michigan, at the District Court Room in the city of Detroit, of the term of June, in the year of our Lord one thousand eight hundred and sixty, in the cause wherein Frederick B. Leonard and Chauncy P. Ives are plaintiffs, and Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell, are defendants.

District of Michigan, *ss.*

Be it remembered, that on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and fifty-eight, the said plaintiffs, by Walker & Russell, their attorneys, came into the court aforesaid, before the judge thereof, and filed their declaration against the said defendants, which said declaration is in the words and figures following, to wit:—

Declaration.

District of Michigan, *ss.*

Frederick B. Leonard and Chauncey P. Ives, who are citizens of the State of New York, plaintiffs herein, by Walker and Russell,

their attorneys, complain of Chauncey Davis, who is a citizen of the State of Michigan, Albert E. Loomis and John C. Dore, who are citizens of the State of Illinois, and Theodore Newell, who is a citizen of the State of Connecticut, partners in the lumber business, at Muskegon, in said State of Michigan, under the firm name of "C. Davis & Co.," defendants herein, of a plea of trespass on the case upon promises, filing this their declaration as commencement of suit.

For that whereas the said plaintiffs before and at the time of the making the agreement and promise of the said defendants hereinafter next mentioned, were the owners of a large quantity of pine saw logs, to wit, about six thousand three hundred and sixty-nine in number, and fourten hundred and forty-four thousand two hundred and forty-three feet in measure, then situate in and about the Muskegon River and Lake, in the county of Ottawa, and State of Michigan, and then lately purchased by said plaintiffs of one Ashley B. Furman, of said county, who caused the same to be measured by scalers, who made the amount as above stated, before the delivery of the same by the plaintiffs to the defendants as hereinafter stated; and thereupon heretofore, to wit, on the sixth day of November, A. D. 1856, at Muskegon, in said county, by a certain agreement in writing then and there made between the said plaintiffs by their agent and attorney in fact Jesse C. Shaw, of the one part, and the said defendants of the other part, it was agreed by and between the said plaintiffs and defendants, that the said defendants bought of the said plaintiffs, and that said plaintiffs sold to said defendants, all the merchantable logs in a quantity of pine saw logs, got out the then last winter by A. B. Furman, supposed to be about fourteen hundred thousand feet in board measurement (meaning the afore described lot of logs), at the rate of four and $\frac{50}{100}$ dollars per thousand feet for those afloat in the booms and bayous near the head of Muskegon Lake, and four and $\frac{25}{100}$ dollars per thousand for those on bank and in marsh near said lake and booms; all said logs to be counted, measured and scaled (meaning to be by said defendants procured to be counted, measured and scaled), by the boom master (meaning the master of the boom at Muskegon, belonging to the Lumbermen's Association, an incorporation under the laws of the State of Michigan), or such other person as parties (meaning said plaintiffs and defendants) might agree on, as said logs were rafted up; and it was further agreed, that said defendants should raft up and secure all they could that fall (meaning the remainder of the season subsequent to the day of date of said contract), and all they could the then next spring, before the new drive should come down (meaning the new drive of logs); and all those not then (meaning at the time of the coming down of the new drive) rafted up were to be scaled as far as to be found on the said banks, booms and bayous.

And it was further agreed, that payment for said logs should be made by said defendants to said plaintiffs as follows: all rafted up as aforesaid the then current fall to be paid for on the fifteenth day

of December then next; those rafted up in the then next spring to be paid for at the end of each month's rafting; and the remainder to be paid for as soon as the scale of those not rafted up should be completed.

And the said agreement being so made as aforesaid, afterwards, and on the day and year aforesaid, at Muskegon aforesaid, in consideration thereof, and that the said plaintiffs at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfil the said agreement in all things on the said plaintiffs' part and behalf to be performed and fulfilled; they, the said defendants, undertook and then and there faithfully promised the said plaintiffs to perform and fulfil the said agreement in all things on said defendants' part and behalf to be performed and fulfilled. And the said plaintiffs in fact say that all the time of the making of the said agreement, all of said quantity of pine saw-logs were merchantable logs and have ever continued so to be.

And that all of said logs were afloat at said time in the booms and bayous near the head of the Muskegon Lake, and were on the bank and in marsh near said lake and booms, to wit, fourteen hundred and forty-four thousand two hundred and forty-three feet.

And further say that all of said logs, to wit, the said number of feet last mentioned, were delivered by said plaintiffs to said defendants the then current fall, to wit, of the year eighteen hundred and fifty-six, and that said defendants could have rafted up and secured all of said logs, to wit, said last mentioned number of feet, the then current fall, to wit, of the year eighteen hundred and fifty-six, according to their aforesaid covenant to raft up and secure all they could during said fall; and further say that said defendants could have rafted up and secured all of said logs, to wit, said number last mentioned, the then current fall and the then next spring before the new drive came down, according to their covenant aforesaid; and further say that a large quantity of said logs were to be found not rafted up after the coming down of the new drive of the then next spring, to wit, of the year eighteen hundred and fifty-seven, on bank and in booms and bayous as aforesaid, to be scaled by said defendants according to their aforesaid stipulation, so that said defendants have become liable to make payment for all of said saw-logs, to wit, said last mentioned number of feet, at the said rate of four dollars and fifty cents ($\$4\frac{50}{100}$) per thousand feet.

And said plaintiffs further say that said plaintiffs were always willing and ready to have the Boom Master as aforesaid, who was at the date of said contract, and hath since continued to be, some person unknown to plaintiffs, and not Barney J. Hatch, count, measure, and scale said pine saw-logs as they were rafted up, and so constantly expressed themselves to said defendants, and were continually from the date of said contract until now ready to agree upon some other person for said purpose, and named to said defend-

ants said Jesse C. Shaw therefor, and were ready in all things to comply with said agreement upon their part. Of all which the said defendants afterwards, to wit, on the day and year aforesaid, had notice; yet the said defendants, not regarding their said agreement nor their said promises and undertaking so by them made as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs, did not nor would perform said agreement, but deceived the said plaintiffs in this, to wit, that the said defendants wholly neglected and omitted to raft up and secure said quantity of logs the then current fall of A. D. 1856, although they could have done so; and also wholly neglected and omitted to raft up and secure said quantity of logs the then current fall of A. D. 1856, and the then next spring of A. D. 1857, before the coming down of the new drive of logs, so called, although they could have done so; and also wholly neglected and omitted to find and scale the logs to be found not rafted up after the coming down of the new drive of the spring of A. D. 1857, on bank, in boom and bayou as aforesaid, although they could have done so; and also wholly neglected and omitted to have said boom master measure and scale said saw-logs as rafted up; but they, the said defendants, their servants and agents, counted, measured, and sealed whatever portion of said logs was rafted up, and utterly omitted to have the logs to be found on bank, in boom and bayou after the coming down of the spring drive of the year eighteen hundred and fifty-seven, scaled at all by any person. And said defendants also contriving and fraudulently intending to deceive and defraud said plaintiffs, have not as yet paid said plaintiffs for all of said logs afloat at the time of making said contract, in the booms and bayous near the head of said Muskegon Lake, and on bank and in marsh near said lake, delivered by the said plaintiffs to the said defendants during the fall of said year eighteen hundred and fifty-six, to wit, fourteen hundred and forty-four thousand two hundred and forty-three feet, at said last mentioned rate, nor for any part of said logs; and have not as yet paid said plaintiffs for all of said logs that could have been rafted up and secured by said defendants the said current fall of the year eighteen hundred and fifty-six, to wit, said last mentioned number of feet at said last mentioned rate, nor for any part thereof; and have not as yet paid said plaintiffs for all of said logs that could have been rafted up and secured by said defendants the said current fall of the year eighteen hundred and fifty-six, and the said next spring of the year eighteen hundred and fifty-seven, before the coming down of the new drive of logs of said spring, to wit, said last mentioned number of feet at said last mentioned price, nor for any part of said logs; and have not as yet paid said plaintiffs for all of said logs that were to be found after the coming down of said last mentioned drive, on bank and in boom and bayou near said lake not rafted up, to wit, said last mentioned number of logs at said last mentioned price, nor for any part of said logs, although often requested so to do, but have

hitherto wholly neglected and refused so to do, and still do neglect and refuse, to wit, at Muskegon aforesaid.

And for that whereas also the said plaintiffs before and at the time of the making of the agreement and promise of the said defendants hereinafter next mentioned, were the owners of a large quantity of pine saw-logs, to wit, about six thousand three hundred and sixty-nine in number, and fourteen hundred and forty-four thousand two hundred and forty-three feet in measure, then situate in and about the Muskegon River and Lake, in the county of Ottawa and State of Michigan; and then lately purchased by said plaintiffs of one Ashley B. Furman of said county, and thereupon heretofore, to wit, on the sixth day of November, eighteen hundred and fifty-six, at Muskegon in said county, in consideration of the premises; and that the said plaintiffs at the special instance and request of the said defendants by a certain agreement in writing then and there made between the said plaintiffs by their agent and attorney in fact, Jesse C. Shaw, of the one part, and the said defendants of the other part, stipulated and agreed to sell to said defendants all the merchantable logs in a quantity of pine saw-logs got out the last winter by A. B. Furman, supposed to be about fourteen hundred thousand feet in board measurement, meaning the afore described lot of logs at the rate of four dollars and fifty cents per thousand feet for those afloat in the booms and bayous near the head of Muskegon Lake, and four dollars and twenty-five cents per thousand feet for those on bank and in marsh near said lake and booms. They, the said defendants, by the said agreement in writing then and there made and signed by them, did bargain for and agree to buy all the merchantable logs in said quantity of pine saw-logs last mentioned, at the price and rate last above mentioned, when the same should be by said defendants rafted up and secured, counted, measured and scaled as hereinafter stated; and the said defendants for like consideration, further stipulate and agree in and by said agreement, that all said logs should be counted, measured and scaled, (meaning to be by said defendants procured to be counted, measured and scaled), by the boom master (meaning the master of the boom at Muskegon, belonging to the Lumberman's Association, an incorporation under the laws of the State of Michigan), or such other person as parties (meaning said plaintiffs and defendants) might agree on as said logs were rafted up.

And did further in like manner agree that they, said defendants, would raft up and secure all they could that fall (meaning the remainder of the season subsequent to the day of the date of said contract), and all they could the then next spring before the new drive should come down (meaning the new drive of logs), and that all those not then (meaning at the time of the coming down of the new drive) rafted up, they, the said defendants, would scale as far as to be found on the said banks, booms and bayous.

And they, said defendants, in like manner and for like consideration did then and there further agree that payment should be made

by said defendants to said plaintiffs, as follows: All rafted up as aforesaid, the then current fall, to be paid for on the fifteenth day of December then next; those rafted up in the then next spring, to be paid for at the end of each month's rafting, and the remainder to be paid for as soon as the scale of those not rafted up should be completed.

And the said agreement being so made as aforesaid, afterwards and on the day and year aforesaid, at Muskegon aforesaid, in consideration thereof, and that the said plaintiffs, at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfil the said agreement in all things on the said plaintiffs' part and behalf to be performed and fulfilled, they, the said defendants, undertook, and then and there faithfully promised the said plaintiffs' to perform and fulfil the said agreement in all things on said defendants' part and behalf to be performed and fulfilled.

And the said plaintiffs in fact say, that at the time of the making of said agreement all of said quantity of fine saw-logs were merchantable logs, and have ever continued to be so.

And that all of said logs were afloat at said time in the booms and bayous near the head of Muskegon Lake, and were on the bank and in marsh near said lake and booms, to wit, fourteen hundred and forty-four thousand and forty-three feet.

And further say, that all said logs, to wit, the said number of feet last mentioned, were delivered by said plaintiffs to said defendants the then current fall, to wit, of the year eighteen hundred and fifty-six, and that said defendants could have rafted up and secured all of said logs, to wit, said last mentioned number of feet the then current fall, to wit, eighteen hundred and fifty-six, according to their aforesaid covenant, to raft up and secure all they could during said fall. And further say that said defendants could have rafted up and secured all of said logs, to wit, said number last mentioned, the then current fall and the then next spring, before the new drive came down, according to their covenant aforesaid. And further say that a large quantity of said logs were to be found not rafted up after the coming down of the new drive of the then next spring, to wit, of the year eighteen hundred and fifty-seven, on bank and in booms and bayous as aforesaid, to be scaled by said defendants according to their aforesaid stipulation; so that said defendants have become liable to make payment for all of said saw-logs, to wit, said last mentioned number of feet, at the said rate of four dollars and fifty cents ($4 50) per thousand feet.

And said plaintiffs further say, that said plaintiffs were always willing and ready to have the Boom Master as aforesaid, who was at the date of said contract, and hath since continued to be some person unknown to plaintiffs, and not said Barney S. Hatch, count, measure and scale said pine saw-logs as they were rafted up, and so constantly expressed themselves to said defendants, and were con-

tinually from the date of said contract until now ready to agree upon some other person for said purpose, and named to said defendants said Jesse C. Shaw, therefore, and were ready in all things to comply with said agreements on their part.

Of all which the said defendants afterward, to wit, on the day and year aforesaid, had notice. Yet the said defendants, not regarding their said agreement nor their said promises and undertaking so by them made as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs, did not nor would perform said agreement, but deceived the said plaintiffs in this, to wit, that the said defendants wholly neglected and omitted to raft up and secure said quantity of logs the then current fall of A. D. 1856, although they could have done so, and also wholly neglected and omitted to raft up and secure said quantity of logs the then current fall of A. D. 1856, and the then next spring of A. D. 1857, before the coming down of the new drive of logs so-called, although they could have done so; and also wholly neglected and omitted to find out and scale the logs to be found not rafted up after the coming down of the new drive of the spring of A. D. 1857, on bank in boom and bayou as aforesaid, although they could have done so; and also wholly neglected and omitted to have said Boom Master measure and scale said saw-logs as rafted up, but they, the said defendants, their servants and agents, counted, measured, and scaled whatever portion of logs was rafted up, and utterly omitted to have the logs to be found on bank in boom and bayou, after the coming down of the spring drive, of the year eighteen hundred and fifty-seven, scaled at all by any person.

And said defendants also contriving and fraudulently intending to deceive and defraud said plaintiffs, have not as yet paid said plaintiffs for all of said logs afloat at the time of making said contract in the booms and bayous, near the head of said Muskegon Lake, and on bank and in marsh near said lake, delivered by said plaintiffs to the said defendants during the fall of said year, eighteen hundred and fifty-six, to wit, fourteen hundred and forty-four thousand two hundred and forty-three feet at said last mentioned rate, nor for any part of said logs; and have not as yet paid said plaintiff for all of said logs that could have been rafted up and secured by said defendants the said current fall of the year eighteen hundred and fifty-six, to wit, said last mentioned number of feet at said last mentioned rate, nor for any part thereof; and have not as yet paid said plaintiffs for all of said logs that could have been rafted up and secured by said defendants the said current fall of the year eighteen hundred and fifty-six, and the said next spring of the year eighteen hundred and fifty-seven, before the coming down of the new drive of logs of said spring, to wit, said last mentioned number of feet at said last mentioned price; nor for any part of said logs; and have not as yet paid said plaintiffs for all of said logs that were to be found after the coming down of said last mentioned drive on bank and in boom and

bayou near said lake not rafted up, to wit, said last mentioned number of logs at said last mentioned price, nor for any part of said logs, although often requested so to do, but have hitherto wholly neglected and refused so to do, and still do neglect and refuse, to wit, at Muskegon aforesaid.

And whereas, also, the defendants at Muskegon aforesaid, on the first day of March, A. D. 1858, were indebted to the plaintiffs in the sum of five thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiffs to the defendants at their request.

And in a like sum for the price and value of work then and there done, and materials for the same provided by the plaintiffs for the defendants at their request.

And in a like sum for money then and there lent by the plaintiffs to the defendants at their request.

And in a like sum for money then and there paid by the plaintiffs for the defendants at their request.

And in a like sum for money then and there received by the defendants for the use of the plaintiffs.

And in a like sum for money found to be due from the defendants to the plaintiffs on an account stated between them at said Muskegon.

And, whereas the defendants afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiffs to pay them the said several last mentioned moneys respectively on request; yet they have disregarded their promises and have not paid any of the said moneys or any part thereof. To the plaintiffs' damage of ten thousand dollars; and thereupon they bring suit, &c.

WALKER & RUSSELL,
Plaintiffs' Attorneys.

We hereby acknowledge ourselves security for all costs for which the plaintiffs may become liable in this suit.

WALKER & RUSSEL,
Detroit, March 27th, 1858. Pl'tiffs Att'ys.

Due legal and personal service of the within declaration and rule to plead endorsed thereon upon the within defendants is admitted hereby.

GEO. V. N. LOTHROP,
Att'y for Defendants.

Detroit, March 30th, 1858.

Plea and Notice.

District of Michigan, *ss.*

And the said defendants, by George V. N Lothrop, their attorney, come and defend the wrong and injury, when, &c., and as to the declaration of the said plaintiffs, say that they did not undertake or promise in manner and form as the said plaintiffs hath above thereof

complained against them, and of this they put themselves upon the country, &c.

And the said defendants give notice that on the trial of said cause they will insist upon and prove that of the logs mentioned in the contract set up in the said plaintiffs' said declaration, only a small quantity, to wit, about seven hundred thousand feet, of all qualities and description, was found by the defendants, and came to their hands, though they used all reasonable diligence and effort to have the same rafted up, secured, measured, and scaled as provided for in said contract.

And the said defendants will insist upon and prove that of such logs as they found as aforesaid, only a small portion, to wit, not exceeding one-fourth thereof, were merchantable logs within the meaning of said contract, and the remainder of said logs were unmerchantable in that they were either too small in size, or shaky, knotty, rotten, unsound, or otherwise defective in quality.

And the said defendants will show and insist that the said plaintiffs, instead of furnishing the said defendants the quantity of merchantable logs contemplated and agreed to be furnished by said contract, the said plaintiffs furnished to the said defendants only a small portion of said quantity of said logs, and that of the logs as furnished, only a small portion were merchantable, and that through the said default and wrong of said plaintiffs, the said defendants suffered a large amount of damages, to wit, the sum of five thousand dollars, which said damages they will prove on said trial, and claim that the same should be allowed to them by way of recoupment of the damages claimed by said plaintiffs in their said declaration.

And the said defendants further give notice that on the said trial they will prove by way of set-off certain indebtedness due from the said plaintiffs to the said defendants, and which was so due at the time of the commencement of this suit, and which still is so due, to wit, the sum of three thousand dollars for money before that time paid and advanced to the said plaintiffs by the said defendants at the instance and request of said plaintiffs. And the further sum of three thousand dollars for money before that time lent by the said defendants to the said plaintiffs at their instance and request. And the further sum of three thousand dollars for money before that time paid by the said defendants to and for the use of the said plaintiffs, at their especial instance and request. And they will claim and insist that the said sums shall be allowed to them on said trial by way of set-off, according to the statute in such case, and provided.

GEORGE V. N. LOTHROP,
Attorney for Defendants.

Therefore to try the issue above joined, let a jury come thereof by whom, &c., and who neither, &c., because as well the said plaintiffs as the said defendants have put themselves upon that jury. And the jurors of that jury of whom mention is made, to wit, Cyrus

Wells, Elijah Dixon, Daniel Hixon, Edward A. Franks, Tobias Price, Joseph W. Brown, Augustus S. Johnson, Thomas B. Clarke, John Roberts, William Cook, Abraham Smolk, and Orville S. Allen also came, who, being elected, tried, and sworn to try the issue above joined, after hearing the evidence adduced, and receiving the charge of the court, say they find that the said defendants did not undertake and promise in manner and form as the said plaintiffs have in their said declaration alleged against them.

Motion for New Trial by Plaintiffs.

And now, to wit, on the fifth day of November, in the year of our Lord one thousand eight hundred and fifty-eight, come the plaintiffs by the said attorneys, and move the court for a new trial of this cause. Whereupon, the said cause was continued from term to term until the twenty-first day of June, in the year of our Lord one thousand eight hundred and sixty, at which day the said court overruled and denied the said motion for a new trial with costs to be paid by said plaintiffs.

Judgment.

Therefore, it is considered that the said plaintiffs take nothing by their said declaration, but that they and their pledges to prosecute be in mercy, &c., and that the said defendants go thereof without day, &c. And it is further considered by the said court that the said defendants do recover against the said plaintiffs
for their costs and charges by them about this suit in their defence laid out and expended, by the said court now here adjudged to the said defendants, and with their assent, according to the form of the statute in such case made and provided, and that the said defendants have execution thereof.

Judgment signed on the twenty-first day of June, in the year of our Lord one thousand eight hundred and sixty.

(Signed) WM. D. WILKINS,
Clerk.

United States of America, Circuit Court of the United States, for the District of Michigan, *ss.*

FREDERICK B. LEONARD & CHAUNCY P. IVES
vs.
CHAUNCY DAVIS, ALFRED E. LOOMIS, JOHN C. DORE & THEODORE NEWELL.

I, William D. Wilkins, Clerk of said Court, do hereby certify the above and foregoing to be a true copy of the original record of judgment in the above entitled cause; the same having been carefully

compared by me with such original, is a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at Detroit, this fifth day of November, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fifth.

[SEAL.] WM. D. WILKINS, Clerk.

District of Michigan *ss.*

I, Ross Wilkins, Judge of said Court, do hereby certify that William D. Wilkins is Clerk of the Circuit Court of the United States for the District of Michigan, that the seal annexed to the above certificate signed by him, is the seal of said court, and that the above attestation is in due form.

In testimony whereof, I have hereunto signed my name officially this fifth day of October, A. D. 1860.

ROSS WILKINS.

(Bill of Exceptions.)

In the Circuit Court of the United States for the District of Michigan.

FREDERICK B. LEONARD and CHAUNCEY P. IVES
vs.
CHAUNCEY DAVIS, ALFRED E. LOOMIS, JOHN C. DORE and THEODORE NEWELL.

And afterwards, to wit, at a Circuit Court of the United States for the District of Michigan, held at the Young Men's Hall in the city of Detroit, on the 25th day of October, A. D. 1858, before the Hon. Ross Wilkins, Judge, duly appointed to hold said court, the aforesaid issue came on to be tried by a jury of said District, good and lawful men of said District for that purpose empanelled, at which day came then as well the said plaintiffs as the said defendants by their said attorneys, and the jurors of the jury aforesaid being called also came and were duly then and there chosen and sworn to try the said issue. And the plaintiffs, by their counsel, proved the contract declared on, a copy of which is hereto annexed and marked "A." The plaintiffs then offered evidence by the deposition of one J. C. Shaw, tending to prove the admission of Davis one of the defendants, that he, "had neglected to scale said logs."

The plaintiffs then to show the knowledge of the defendants anterior to the making of the contract, of the quantity and locality of the logs, offered in evidence a certain written paper signed by C. Davis, one of the defendants, as Treasurer of the Lumbermen's Association so called, and purporting to be a receipted draft drawn by said Davis on plaintiffs for $525 00, being the price of driving down into the boom of said association 1444 thousand feet of logs belonging to the plaintiffs. Said defendants objected to the admission of

the same, whereupon said Circuit Court sustained said objection and excluded said evidence, to which said plaintiffs excepted.

The plaintiffs then by Joseph Hachley, a witness, gave evidence tending to show there was in 1856, and ever since, a corporation at Muskegon, called the Lumbermen's Association; that they maintained a very large boom at the bend of Muskegon Lake, covering over 200 acres, which was designed to receive all the logs which came down Muskegon River; that witness was boom master in 1857 and 1858, but that he personally scaled none of the plaintiffs' logs.

On cross-examination, witness gave evidence tending to prove that he had deputies; that Barney L. Hatch was his deputy in 1857, and was employed to do the scaling of logs.

The counsel of defendant then proposed to witness the following question:—

Was there any other person who performed any of the duties of boom master and was called boom master?

To which question plaintiffs' counsel objected; which objection the court overruled, and plaintiffs' counsel excepted thereto.

The witness answered that there was such person who performed such duties, and was so called; that that person was Barny L. Hatch; that said Hatch had charge of inspecting and scaling the logs in the boom and the delivering them out of the boom to the proper owners; that the duty of the witness was to take care of the boom and to keep it in a condition to retain and keep secure the logs.

The plaintiffs also by A. J. McHenry, a witness, gave evidence tending to prove that in 1857 he worked at scaling logs in said big boom, and that said Davis, one of the defendants, employed him and paid him for rafting and scaling; that witness and B. L. Hatch had in that year a contract to raft up defendants' logs in the big boom.

On cross-examination, witness gave evidence tending to show that he acted in scaling logs as assistant to B. L. Hatch (and was hired to do so by Mr. Hachley).

And on re-examination, that he was employed by defendants to do rafting, and not scaling; that in scaling he was personally employed and worked for the association; that Hatch and witness hired men to do the rafting.

The plaintiffs then by witnesses, O'Harrow and Laing, gave evidence tending to show that in 1857 they were in the employment of defendants, and that they scaled certain of the logs described in the contract sued on in this case, and received their pay from defendants.

On cross-examination, they gave evidence tending to show that the logs which they scaled were all in defendants mill-boom, having been collected from the beach and marshes and brought directly to the mill-boom, and that they did such scaling at the request of B. L. Hatch.

The plaintiffs then by books of said association gave evidence tending to show that defendants had rafted up and secured of the logs

which were described in said contract, logs, which by the scaling measured 760,719 feet.

The plaintiffs then, for the purpose of proving the quantity of logs for which the defendants were liable in this action, offered to read in evidence the depositions of A. C. Shaw, Ezekiel J. Leathers and Hiram J. Walker, tending to show the quantity of a lot of logs scaled by them for A. B. Furman in the woods where they were cut in the winter of 1855 and 1856, near the banks of the Muskegon River, about 40 miles above the boom; also to prove by A. B. Furman, that said lot of logs was the same which he sold to plaintiffs and which were intended in the contract made between plaintiffs and defendants; and by A. B. Watson and A. J. McHenry, that they had contracts for the spring drive of logs in the Muskegon River in the spring of 1856; and that they followed these logs with the spring drive down into the big boom.

To which evidence the defendants objected, and the court sustained the objection, and the plaintiffs excepted.

And after some further evidence, the said plaintiffs closed their case.

And said defendants, to prove said issue on their part, offered the deposition of one Dawson and certain persons as witnesses, namely: Lange, Baker, Easton, G. Ruddiman, Truesdale, Mason, Ludlow, Myers, A. Trowbridge, T. F. Trowbridge, T. Ryerson, R. O'Harrow, J. Ruddiman, T. J. Waters and R. W. Morris, and offered to prove that said logs were of bad quality, unmerchantable and worthless; that the defects were, for the most part, latent, and could not be discovered, while the logs were floating in the large boom before they were rafted up; that after the logs had been in the water six months, the unmerchantable character of the logs could not be discovered generally, only by sawing them up or by cutting into them; that after the logs had been rafted up and taken out of the big boom, by the custom of the lumber dealer, logs could not be returned to the boom, nor rejected and set adrift, but must be taken care of; and that the only practicable mode for defendants to dispose of them was, by sawing them up wholly or in part, or laying them aside to be burned; to all of which testimony the plaintiffs by their counsel objected, but the court overruled the objection, and admitted the testimony.

And said Morris having been produced and sworn, defendants asked said Morris, "what was the general character of the piece in that section of the country?" (meaning, where the said logs were cut), and offered to prove the same to be bad; to which question and testimony the said plaintiffs objected, and the court overruled the objection and admitted the testimony, and plaintiffs accepted.

And the defendants by said witnesses gave testimony tending to prove—

That at the time of the contract of purchase by defendants, the

said logs were afloat in the association booms in Muskegon Lake, mixed up with many millions of other logs.

That owing to the state of the weather and the situation of the logs in the lake, they were entirely inaccessible for examination at the time of contract; and that even if accessible, no effectual inspection could be made of the quality, nor could the quantity be ascertained except by rafting up and scaling them.

That the custom of rafting and scaling logs in the said association boom was as follows: each owner of logs sent to the boom a number of men equal to his proportion of the logs therein. These raftsmen in company took the logs from the boom, as they came to them out of the mass of logs, separated the logs of different owners, (which they were well able to do by marks stamped on them when they were put in the river above to be driven down), and put the logs of each owner in separate rafts, after which the logs so in rafts were scaled or measured, and counted by the boom master and his assistants.

That it required two or three men to do the scaling and keep the tally, who were employed by the association. That this was the only manner in which logs were ever rafted in said boom, or could be so rafted.

That to select the logs of one owner from the whole mass of logs in the boom, and raft them separately, would cost much more than they were worth, and was impracticable.

That when the logs of said plaintiff, for which this suit is brought, first came down the river, the said boom at the head of the lake was unfinished, some of the logs in the drive (which contained some forty millions of feet, including the logs in question), were carried past the boom in Muskegon Lake, of which a part drifted on to the shores of said lake and the marshes adjacent, and a part carried out into Lake Michigan and lost.

That some of the logs of said plaintiffs so scattered on the shores of Muskegon Lake and the marshes adjacent, had been collected and recovered by the raftsmen of the different mills after the purchase by defendants, and being found to have the plaintiffs' mark on them, had been brought by said raftsmen to defendants' mill boom, and these were the logs scaled by Lang and O'Harrow at the request of McHenry.

And after some further evidence, the said defendants closed their case.

And said plaintiffs (November the fifth) requested said Circuit Court to charge and instruct the said jury as follows:—

1. First, that by the terms of the contract the sale was of the whole quantity of logs (their locality and position being known to both parties, they being in the power of the defendants, their identification being complete, and nothing to be further done by the vendors, except something consequent upon the acts of the vendees, in fulfilment of the contract, and that an inconsiderable matter);

that the property passed by the sale, and the defendants are responsible for the whole, as specified in the contract, *unless* in fulfilment of the contract they exonerate themselves, according to its terms, from liability for a part.

2. Second. That by the terms of the contract and the situation of the property as mentioned in it, and as it was in fact at the time, the whole quantity of logs was delivered to the vendee; that all the delivery was made which could be made of such property under the circumstances: it was put into the power and under the control of the vendees; the intention was evident, and they so treated it by their acts and conduct, and they became responsible, as stated in the first charge requested.

3. Third, that the clause in the contract "said Davis & Co. agreed to take and pay for all the *merchantable* logs at the rates and on the conditions aforesaid," gave the defendants the right to reject any logs that were unmerchantable at the time they received them into their raft and boom and completed the scale, and they were bound *then* to make their election and determination as to the merchantable character of the logs; that these words giving the defendants the right to reject unmerchantable logs do not constitute an implied warranty of the quality of the logs; that there is no express warranty, and the plaintiffs are therefore not responsible for any latent defects which the defendants may subsequently have discovered in the logs after the same were taken from the association boom, rafted up, scaled, and placed in the defendants' boom by their agent and servants.

4. Fourth, that the defendants having received the logs into their boom and proceeded to saw up and dispose of a large portion thereof, without notice to the plaintiffs of any objection to the logs so sawed up, as remaining in their possession unsound, they cannot in this action claim a deduction from the prices of the logs on account of any alleged defect in quality either patent or latent.

5. Fifth, that the defendants by the terms of the contract were to pay (and did in fact pay) for all the logs "rafted up" in the fall, by the 15th day of December then next, and were to pay for those rafted up in the spring at the end of each month's rafting, and for the balance as soon as the scale of those not rafted should be completed; and therefore were bound to pay for the logs at those times, and *then* to make their election of such as were merchantable, they were then to take and pay for such as were merchantable, and were to pay as they were rafted up and scaled; that if they did not *then* reject any logs as unmerchantable they could not afterwards, and after the right of action for the price was fixed, claim a deduction for defects discovered in the subsequent sawing, there being neither fraud nor warranty of quality in the case.

And said Circuit Judge refused so to charge and instruct said jury, to which said plaintiffs did then and there except.

The Circuit Judge instructed the jury that said contract was ex-

ecutory, and that the title to the logs did not pass till after admeasurement; that said admeasurement was equally for the benefit of both parties, and the boom master was made their common agent for that purpose; that if the jury found from the evidence that it was impracticable for the boom master to do the scaling alone, and that it was the custom in the association for the boom master to have assistants, then the scaling and admeasurement in this case might be lawfully done by such assistants under the orders of the boom master.

That it was equally incumbent upon plaintiffs and defendants in this case to have the logs scaled and measured.

That the plaintiffs in this action could recover only for such logs as had been scaled and come to the possession of defendants.

That the contract imported a warranty that the logs were merchantable; that the defendants were entitled to a reasonable opportunity to ascertain the quality of the logs. That if the jury found from the evidence that such quality could not be determined till after they had been rafted up and taken to defendants' mill boom, and then only by sawing them up or chopping into them, they had a right to do so; and further, that if they found that the unmerchantable logs were entirely worthless, the defendants were entitled to recoup their damages for such defects without returning the logs to the plaintiffs, or giving them notice of such defects and requiring them to take them away; to which said opinions and charges said plaintiffs did then and there except.

And said court under the charges aforesaid left the aforesaid issue and the evidence so given on the trial as aforesaid to the said jury. And the said jury then and there gave their verdict for the said defendants for their costs.

And because none of the said exceptions made to the opinions and decisions of the said Circuit Judge, do appear upon the record of the said trial, therefore, on the prayer of the said plaintiffs by their counsel, the said Circuit Judge hath to this bill of exceptions put his seal according to the statute in such case made and provided this first day of July, A. D. 1859. ROSS WILKINS. [SEAL.]

I agree substantially with the ruling of the District Judge, and am consequently opposed to a new trial. If the object be to take a writ of error to the Supreme Court, I will allow a writ of error, which follows. JOHN McLEAN.

I allow a writ of error in the above case, the motion for a new trial being overruled, and a judgment being entered on the verdict.
JOHN McLEAN, Justice Sup. Court U. States.

The clerk of the Circuit Court will take bond and security in five hundred dollars. 25 May, 1860.

Exhibit A.

(Literal Copy.)

C. Davis & Co., of Muskegon, Mich., bo't of Leonard and Ives, of Lansingburgh, pr. J. C. Shaw, agent, a quantity of pine saw-logs, got out last winter by A. B. Furman, supposed to be about fourteen hundred and forty-four (1444 M. ft.) thousand feet in board measure, at the rate of four and $\frac{50}{100}$ dollars per M. ft. for those afloat in the booms and bayous near the head of Muskegon Lake, and four and $\frac{25}{100}$ dollars per M. ft. for those on bank and in marsh, near said lake and booms—all to be counted, measured, and scaled by the boom master, or such other person as parties may agree on, as they are rafted up. Said Davis & Co. are to raft up and secure all they can this fall and all they can next spring, before the new drive comes down, and those not rafted up at that time are to be scaled as far as to be found on bank, in booms, and bayous as aforesaid.

Payments to be made as follows:—

All rafted up this fall to be paid for on 15th December next; those rafted in spring to be paid for at the end of each month's rafting; and the balance to be settled for as soon as the scale of those not rafted shall be completed as aforesaid; and we, said Davis & Co., agree to take all the merchantable logs at the rates and on the conditions herein named.

In consideration of the foregoing contract and sale, we acknowlege the receipt of one hundred dollars.

Muskegon, Michigan, November 6th, 1856.

(S'gd) J. C. SHAW,
Agent for Leonard & Ives.

(S'gd) C. DAVIS & CO.

Endorsed: Circuit Court of the United States for District of Michigan, Frederick B. Leonard et al. *vs.* Chauncey Davis et al. Bill of exceptions. Filed in open court, July 1, 1859. Jno. Winder, Clerk.

(Bond on Appeal for Costs.)

Know all men by these presents, that we, Frederick R. Leonard and Chauncey P. Ives, as principals, and George B. Warren and Alexander Walsh, as securities, all of the county of Rensselaer and State of New York, are held and firmly bound unto Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell in the penal sum of five hundred dollars, to the payment whereof well and truly to be made to the said Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell, their heirs, executors, administrators, or assigns, we bind ourselves, our heirs, executors, administrators, and assigns firmly by these presents.

Sealed with our seals. Dated at Troy, in the State of New York, this 22d day of October, A. D. 1860.

Whereas, the said Frederick B. Leonard and Chauncey P. Ives have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a certain suit in the Circuit Court of the United States for the Seventh Circuit and District of Michigan, wherein the said Frederick B. Leonard and Chauncey P. Ives were plaintiffs, and the said obligees were defendants.

Now therefore the condition of this obligation is such, that if the above named Frederick B. Leonard and Chauncey P. Ives shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation to be void, otherwise to be and remain in full force and virtue.

F. B. LEONARD, [SEAL.]
CHAUNCEY P. IVES, [SEAL.]
GEO. B. WARREN, [SEAL.]
A. WALSH. [SEAL.[

Signed, sealed, and delivered, in presence of
R. H. OJERS, as to Leonard, Ives, and Walsh.
Witness for G. B. Warren,
P. C. ROBERTS.

District of Michigan, *ss.*

I hereby approve of the sufficiency of the within bond and the sureties thereto. ROSS WILKINS,
One of the Judges of the Circuit Court for the District of Michigan.

Endorsed: Leonard & Ives *vs.* Davis *et al.* Bond in Error.

In the Supreme Court of the United States.

FREDERICK B. LEONARD, and CHAUNCEY P. IVES, vs. CHAUNCEY DAVIS, ALFRED E. LOOMIS, JOHN C. DORE, and THEODORE NEWELL.

In Error to the Circuit Court of the United States, for the District of Michigan.

Of the term of December, one thousand eight hundred and sixty.

Afterwards, to wit, on the first Monday of December, in this same term, before the Justices of the Supreme Court of the United States aforesaid, at the Supreme Court Room in the city of Washington, come the said Frederick B. Leonard and Chauncey P. Ives, by Alfred Russell, their attorney, and say that in the record and proceedings, and also in giving the judgment aforesaid, there is manifest error in this, to wit:—

1. That the said Circuit Court erred in excluding the said receipted draft for $525.00, drawn by said defendant, Chauncey Davis, upon said plaintiff, when by them offered in evidence, to show know-

ledge on the part of said defendants of the quantity and locality of said logs, prior to the making of said contract.

2. There is also error in this: that said Circuit Court permitted said defendants to ask said witness, Joseph Harkley, the boom-master, whether there was any other person who performed any of the duties of boom-master, and was so called.

3. There is also error in this: that said Circuit Court excluded the evidence offered by said plaintiffs, by the depositions of Shaw, Leathers, and Walker, to show the quantity of a lot of logs scaled by them for A. B. Furman, in the woods on the Muskegon River, above the boom, as well as the evidence of said Furman, offered to show that said lot of logs was the same by him sold to plaintiffs, and which were the subject-matter of this suit, and the evidence of Watson and McHenry, that said logs were followed down into the boom.

4. There is also error on this: that said Circuit Court admitted the evidence offered by the defendants, by witnesses Dawson, Lange, Baker, and many others, to show that said logs were of bad quality, unmerchantable, and worthless, by reason of latent defects, undiscoverable until the sawing up.

5. There is also error in this: that said Circuit Court admitted the evidence of the witness, Morris, offered by the defendants, to show that the general character of the pine in that section of country where said logs were cut was bad.

6. There is also error in this: that said Circuit Court refused to charge and instruct said jury according to the five requests made by said plaintiffs, but did charge the contrary thereof in such manner and form as appears by said bill of exceptions.

7. There is also error in this: that by the record aforesaid, it appears that the aforesaid judgment was given for said defendants against said plaintiffs; whereas, by the law of the land, the said judgment ought to have been given for said plaintiffs against said defendants.

Wherefore, said plaintiffs pray, that the judgment aforesaid, for said errors, and other errors appearing upon said record and proceedings, may be reversed and held for nought, and that they may be restored to all things which they have lost by occasion of said judgment; and that it be certified to said Circuit Court what of right ought to be done.

ALFRED RUSSELL,
Attorney & Counsel for Pl'ffs in error.

Endorsed: Supreme Court, United States. Frederick B. Leonard, Chauncey P. Ives, *v.* Chauncey Davis, Alfred E. Loomis, John C. Dore, and Theodore Newell. Assignment of Errors. Filed, 13 Dec., 1860. ALFRED RUSSELL, Pl'ffs' Att'y.

Filed, 12 Nov., 1860.